

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Telecommunications Relay Services and) CG Docket No. 03-123
Speech-to-Speech Services for)
Individuals with Hearing and Speech Disabilities)
)
Purple Communications, Inc.)
Emergency Petition for Limited Waiver)

ORDER

Adopted: August 13, 2013

Released: August 13, 2013

By the Acting Chief, Consumer and Governmental Affairs Bureau:

1. In this order, the Consumer and Governmental Affairs Bureau (CGB) of the Federal Communications Commission (Commission), pursuant to delegated authority,¹ addresses Purple Communications, Inc.’s (Purple) petition for waiver of the Commission’s speed-of-answer (SOA) rule² with respect to Internet protocol (IP) relay service (IP Relay).³

I. BACKGROUND

2. On July 11, 2013, Purple requested, on an emergency basis, a 120-day waiver of the Commission’s SOA rule with respect to its IP Relay service.⁴ Purple asserts that such a waiver is necessary in light of traffic surges resulting from the recent cessation of service by Sorenson Communications, Inc. (Sorenson), announced July 8, 2013, and effective July 31, 2013.⁵ Purple requests that the waiver remain in effect at least 120 days from the date of its petition in order to enable Purple “to quantify the resulting demand, then recruit and train additional IP Relay staff, so that it can comply with the Commission’s strict speed-of-answer requirements.”⁶ Purple adds that it “requires immediate relief in order to continue providing its IP Relay service and simultaneously: (a) monitor porting and minute

¹ 47 C.F.R. §§ 0.141, 0.361.

² 47 C.F.R. § 64.604(b)(2).

³ IP Relay is a form of telecommunications relay service (TRS) in which an individual with a hearing and/or speech disability or who is deaf-blind connects to a communications assistant (CA) using an IP-enabled device via the Internet. *See* 47 C.F.R. § 64.601(17).

⁴ *See* Purple Communications, Inc., Emergency Petition for Limited Waiver (filed July 11, 2013) (Purple Petition).

⁵ *See* Letter from John T. Nakahata, Wiltshire & Grannis LLP, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 03-123 (July 8, 2013). Purple also asserts that earlier cessations of service by IP Relay providers Hamilton Telephone, effective May 15, 2013, and AT&T, effective June 23, 2013, contributed to its need for a waiver. Purple Petition at 1-2. Call data reported to the TRS Fund administrator and the Commission, however, does not indicate that the exit of these providers resulted in a substantial increase in Purple’s traffic.

⁶ Purple Petition at 2.

volume activity to enable revised forecasting, and (b) begin recruiting and training additional staff to handle the increasing demand.”⁷

II. DISCUSSION

A. Waiver Standard

3. Generally, the Commission’s rules may be waived for good cause shown.⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁰ Waiver of the Commission’s rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.¹¹ Moreover, in demonstrating whether a waiver is warranted, the burden of proof rests with the petitioner.¹² An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.¹³

B. Application of Waiver Standard to Purple’s Petition

4. We find that cessation of service by a provider the size of Sorenson, and the consequent migration of its customers, at short notice, to other providers, constitutes “special circumstances” that can warrant deviation from the general rule upon an appropriate showing.¹⁴ We also find that Purple has made an appropriate showing, in its petition and in further communications in response to questions from Commission staff, to justify some relief from strict compliance with the SOA rules in this instance.¹⁵ Nonetheless, while we believe some relief is warranted to ensure that Purple is able to continue to provide

⁷ Purple Petition at 2.

⁸ 47 C.F.R. § 1.3.

⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

¹⁰ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (*WAIT Radio*); *Northeast Cellular*, 897 F.2d at 1166.

¹¹ *Northeast Cellular*, 897 F.2d at 1166.

¹² *Tucson Radio, Inc. v. FCC*, 452 F.2d 1380, 1382 (D.C. Cir. 1971).

¹³ *WAIT Radio*, 418 F.2d at 1157 (citing *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); *Birach Broadcasting Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 1414, 1415-16, ¶ 6 (2003).

¹⁴ The Commission previously has granted a temporary waiver of SOA requirements where levels of demand were unusually unpredictable, given the relationship between projected call volumes and compliance with those requirements. *Telecommunications Relay Services and Speech-To-Speech Services For Individuals With Hearing and Speech Disabilities*, CG Docket No. 98-67, Order, 17 FCC Rcd 157, 162-63, ¶¶ 15-16 (CCB 2001). Likewise, temporary waiver of other TRS rules has been granted where necessary to avoid depriving consumers of service, as the evidence persuades us could occur here if Purple were fully constrained by the SOA requirements and thus limited in its ability to take on new IP Relay users in light of Sorenson’s exit from the marketplace. *See, e.g., Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123, CC Docket No. 98-67, WC Docket No. 05-196, Order, 24 FCC Rcd 14342, ¶ 2 (WCB/CGB 2009).

¹⁵ In the petition, Purple states that its hiring, training and certification process “requires a minimum of eight weeks—four weeks for recruitment and four weeks for intensive training—for each class of new agents.” Purple Petition at 2. As a result, it appears that Purple is not able to complete the hiring of any additional staff in response to Sorenson’s announcement until early September 2013. In addition, in discussions with Commission staff, Purple has represented that its flexibility to increase its level of staffing and service capacity is further limited by its contractual relationship with its service partner.

this important service to consumers who need it, we are also concerned that we not weaken the Commission's SOA rule or the effort to fight fraudulent calls within this service.¹⁶

5. We therefore find good cause to grant Purple a limited waiver of the SOA rule for the period from July 31, 2013, through October 31, 2013, conditioned as discussed below. In its petition, Purple requests that the waiver commence on July 11, 2013, the date Purple filed its petition; however, data provided by Purple does not indicate a substantial increase in Purple's traffic prior to July 31, 2013. In addition, although Purple requested that the waiver continue in effect for 120 days, we conclude that Purple has not justified on the current record the grant of a waiver extending beyond October 31, 2013.¹⁷

6. For the period from August 13, 2013, through October 31, 2013, the SOA rule will be waived for each month¹⁸ in which the conditions discussed below are met.

7. The purpose of this waiver is to allow Purple some flexibility to adjust to a sudden influx of IP Relay customers resulting from Sorenson's cessation of service after July 31, 2013, not to excuse Purple for any SOA violations unrelated to the migration of Sorenson customers. Purple states that the influx of Sorenson customers is causing an overall surge in Purple's traffic levels that puts a constant strain on Purple's ability to process calls, independently of day-to-day variations in traffic levels.¹⁹ Based on our analysis of the information provided by Purple, we conclude that Purple should have the capability to handle at least a 15% overall increase in traffic, at current staffing levels, while continuing to meet its obligations under the SOA rule. Therefore, in order to grant appropriate relief while avoiding any unnecessary weakening of this important rule for a substantial period of time, we will condition the waiver granted to Purple in order to target relief narrowly on the problem as defined.

8. Specifically, Purple has submitted to the Commission a forecast of total anticipated session minutes (Monthly Forecast Session Minutes) for August, September, and October 2013.²⁰ For the SOA waiver to apply to the period from August 13 through August 31, 2013, Purple's total session minutes for August 2013, adjusted as explained below (Monthly Adjusted Session Minutes) must be more than *115 percent* of the Monthly Forecast Session Minutes for August 2013. Similarly, for the SOA waiver to apply to the period from September 1 through September 30, 2013, Purple's Monthly Adjusted Session Minutes for September 2013 must be more than *115 percent* of the Monthly Forecast Session Minutes for September 2013. Finally, for the SOA waiver to apply to the period from October 1 through October 31, 2013, Purple's Monthly Adjusted Session Minutes for October 2013 must be more than *125*

¹⁶ See generally *Misuse of Internet Protocol (IP) Relay Service*, First Report and Order, CG Docket Nos. 12-38, 03-123, 27 FCC Rcd 7866 (2012). See also *Sorenson Communications, Inc.*, File No. EB-TCD-12-00000370, Order, 28 FCC Rcd 7841 (EB 2013) (adopting consent decree and terminating investigation of Sorenson's process for registering and verifying users of IP Relay).

¹⁷ Purple has not shown, for example, that it is unable to hire and train sufficient staff by November 1, 2013, to handle the traffic levels experienced following Sorenson's July 31, 2013, cessation of service.

¹⁸ The period for which the waiver is conditional is August 13, 2013, through October 31, 2013. In an earlier order, the Bureau waived the SOA rule in its entirety for the period from August 1 to August 12, 2013, in order to give Purple an opportunity to adjust to the traffic surge pending our review of its petition. See *Purple Communications, Inc.*, CG Docket No. 03-123, Letter Order, DA 13-704 (CGB, Aug. 2, 2013). Because Purple has reported incurring a substantial increase in traffic on July 31, 2013, as well, we extend the starting date for Purple's waiver back to July 31, 2013.

¹⁹ Purple Petition at 2.

²⁰ See Email from John Goodman, Chief Legal Officer, Purple Communications, Inc., to David Schmidt, Office of the Managing Director, FCC (Aug. 12, 2013). This monthly forecast is prepared by Purple in order to guide decisions on the hiring of CAs.

percent of the Monthly Forecast Session Minutes for October 2013. The threshold for application of the waiver is increased for the month of October to reflect the fact that, by October 1, Purple will have had an opportunity to hire and train some additional CAs to handle the higher levels of traffic it is incurring due to Sorenson's exit.

9. As noted above, the monthly criteria outlined above will be applied to "adjusted" session minutes, which may be lower than Purple's actual session minutes. We require such adjustments for purposes of the waiver granted herein in order to ensure that the waiver is narrowly targeted to the specific problem caused by the sudden influx of Sorenson's ex-customers and that it does not automatically excuse Purple for any other violations of our speed-of-answer requirements that may occur for other reasons. Accordingly, Purple's actual monthly session minutes will be adjusted for purposes of this waiver²¹ as follows. Along with its Monthly Forecast Session Minutes for these months, Purple has submitted to the Commission a forecast of anticipated session minutes for each day of August, September, and October 2013 (Daily Forecast Session Minutes). When Purple files its SOA report for each month, the total session minutes reported for each day of the month will be compared with the Daily Forecast Session Minutes for that day. For any day in August or September for which the total session minutes exceed the Daily Forecast Session Minutes by more than 25 percent, the minutes in excess of 125 percent of Daily Forecast Session Minutes will be subtracted from Purple's total session minutes for that month, and the net result will be Purple's Monthly Adjusted Session Minutes for that month. For any day in October for which the total session minutes exceed the Daily Forecast Session Minutes by more than 40 percent, the minutes in excess of 140 percent of Daily Forecast Session Minutes will be subtracted from Purple's total monthly session minutes, and the result will be Purple's Monthly Adjusted Session Minutes for that month.²² This adjustment reduces the likelihood that the waiver granted in this order could operate to excuse an SOA violation if one were to occur as a result of a failure to adequately prepare for daily variations in traffic rather than as a result of the influx of Sorenson ex-customers.²³

²¹ This Monthly Adjusted Session Minutes number is intended to be used only to determine the application of the conditional waiver granted by this order.

²² As an extreme, purely hypothetical illustrative example, let us suppose that Purple forecasts 100,000 Forecast Session Minutes for the month of September 2013, and that Purple's actual session minutes for the month total 116,000, 116 percent of the forecast. Absent adjustment, this 16 percent difference would qualify Purple for a waiver for the month of September under the 115 percent criterion indicated in the previous paragraph. Let us suppose further, however, that the forecast for September is exceeded at all only because of a traffic "spike" occurring on the three-day Labor Day weekend, perhaps because Purple failed to anticipate the unusually high demand for its service on those three days. If the forecast for each of the three days is 4,000 minutes, and the actual traffic each day is 10,000 minutes, then the actual daily minutes would exceed the forecast by 6,000 minutes on each of the three days, or by a total of 18,000 minutes altogether—more than enough to account for the entire 16,000 difference between actual and forecast minutes for September as a whole. Under the adjustment formula described above, the daily minutes in excess of 125% of Daily Forecast Session Minutes are subtracted from Purple's total monthly session minutes for purposes of calculating Purple's Monthly Adjusted Session Minutes for that month. Thus, for each of the three days, 125 percent of the Daily Forecast Session Minutes is 5,000 minutes (125 percent x 4,000), and there are 5,000 minutes of traffic in excess of that amount, or 15,000 for the three days altogether. Therefore, the 15,000 excess minutes would be subtracted from the 116,000 total session minutes, leaving 101,000 Monthly Adjusted Session Minutes. Since 101,000 is only 101 percent of the 100,000 forecast minutes, it would not be enough for Purple to qualify for a waiver under this order for September 2013. While it is possible that traffic "spikes" such as the hypothetical ones described in this footnote might justify a waiver of the SOA rule in some circumstances, it is appropriate that such spikes, which are unlikely to be the result of the migration of Sorenson customers, would not automatically result in a waiver under the terms of this order.

²³ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CC Docket No. 98-67, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd (continued....)

10. Further, in light of the Commission's continuing diligence and obligations to guard against waste, fraud, and abuse, the Commission must be able to satisfy itself that the grant of this waiver does not affect Purple's ability and incentive to take effective steps to prevent fraud. Therefore, this waiver is subject to two additional conditions. First, we require Purple to report the number of calls disabled by its back-end fraud detection system by day for the 6 months from February through July 2013 and for each day of the period of this waiver. The report for the prior 6 months and for August through the date of this order shall be submitted to David Schmidt, Office of the Managing Director, no later than seven days from the date of this order. Subsequent reports shall be submitted on a weekly basis, on Wednesday of each following week. The Bureau expects that the percentages of calls captured by Purple's system during the waiver period will be consistent with past performance.

11. Second, in order to help the Commission monitor the number of unique users who are porting from Sorenson and confirm that only legitimate users are ported, we require Purple to report the total telephone numbers ported and the number of unique users, for each day of the waiver period. These reports shall be submitted to David Schmidt, Office of the Managing Director, on a weekly basis no later than Wednesday of each following week.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 4(i) and 4(j) and 225 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 225, and sections 0.141, 0.361 and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361 and 1.3, this Order IS ADOPTED.

13. IT IS FURTHER ORDERED that the Petition for Limited Waiver filed by Purple Communications, Inc., on July 8, 2013, IS GRANTED to the extent and subject to the conditions set forth above, for a period of 93 days beginning on July 31, 2013, and ending on October 31, 2013.

14. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Acting Chief
Consumer and Governmental Affairs Bureau

(Continued from previous page)

5140, 5167, ¶ 64 (2000) (*2000 TRS Report and Order*) (requiring daily measurement of speed of answer, rejecting the argument that providers need more leeway "to account for wide daily variations in traffic loads," and finding that "[t]he burden should be on relay services to manage staffing needs based on the fluctuations in traffic, not on consumers to tolerate delays in reaching a CA when traffic is high"). *See also Structure and Practices of the Video Relay Service Program/Purple Communications, Inc./Request for Review of the Decision of the TRS Administrator to Withhold TRS Payments*, CG Docket No. 10-51, Order, 27 FCC Rcd 8014 (CGB 2012).